No. 99-920

In the Supreme Court of the United States

FERRELL TRAVIS RILEY AND CHERYLL S. COON, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record
JAMES K. ROBINSON
Assistant Attorney General
WILLIAM C. BROWN
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the court of appeals held that limitations imposed by the district court on the cross-examination of certain government witnesses was harmless error, and, if so, whether the court permissibly relied on a finding of harmlessness even though the government did not explicitly make such an argument in its brief on appeal.

2. Whether the district court committed clear error at sentencing in calculating the amount of loss attributable to petitioners under Sentencing Guidelines § 2F1.1.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 187 F.3d 888.

JURISDICTION

The judgment of the court of appeals was entered on July 28, 1999. A petition for rehearing was denied on August 31, 1999 (Pet. App. 22a-23a). The petition for a writ of certiorari was filed on November 29, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a joint jury trial in the United States District Court for the Western District of Missouri, petitioner Riley was convicted on one count of conducting the affairs of an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(c); three counts of interstate transportation of property obtained by fraud, in violation of 18 U.S.C. 2314; six counts of violating the Travel Act or of conspiring to commit same, in violation of 18 U.S.C. 371 and 1952; and one count of obstructing justice, in violation of 18 U.S.C. 1510. Petitioner Coon was convicted on the same charges, with the exception of one Travel Act count on which she was acquitted. Pet. App. 2a. Petitioner Riley was sentenced to 108 months' imprisonment, to be followed by three years' supervised release. *Ibid.* Petitioner Coon was sentenced to 87 months' imprisonment, also to be followed by three years' supervised release. *Ibid.* The district court further ordered the payment of $850,590 in restitution. *Ibid.* The court of appeals affirmed. *Id.* at 1a-21a.

1. Petitioners' convictions arose out of their operation of four companies that sold insurance and provided insurance-related services. Pet. App. 2a-3a. Petitioners marketed and sold insurance policies, collected premium payments on those policies, and then used the funds for other purposes, leaving numerous insurance claims unpaid and forcing corporate victims into insolvency. *Id.* at 3a.

The evidence at trial established that in April 1991, petitioners' company, "Meadowlark Insurance," entered into an agreement with Commercial Acceptance Insurance Company (CAIC) pursuant to which Meadowlark undertook to sell insurance under CAIC's name. Although CAIC's principals explained to petitioners that CAIC was not licensed to sell health insurance, petitioners, acting as authorized agents of CAIC, signed a contract to provide health insurance to members of the

Western Businessmen's Association (WBA). *Ibid.* Between August and November 1991, WBA members paid more than $1,000,000 in health insurance premiums that were deposited into a trust account at the Trans-Pacific Bank in Alameda, California. *Id.* at 3a-4a. Petitioner Coon later withdrew $649,000 from the TransPacific account, closed the account, and used the withdrawn funds for unrelated purposes including bribes, personal investments, and the purchase of another insurance company. *Id.* at 4a. In October 1991, CAIC learned that petitioners were using its name to underwrite health insurance policies. CAIC therefore withdrew Meadowlark's authority to act as its agent. *Ibid.*

The evidence at trial also established that petitioners, through an entity they formed called M&M Management, undertook to provide medical malpractice insurance for a group of podiatrists called the International Association Coalition (IAC). Petitioners transferred more than $200,000 in premiums paid for that insurance into unrelated accounts in other States, and used the funds for unrelated purposes. Pet. App. 5a.

The evidence further showed that petitioners diverted $290,000 in insurance premiums to certain bank accounts in Missouri, in an attempt to bribe the Missouri Commissioner of Insurance into helping petitioners obtain a Missouri insurance license for Meadowlark. Pet. App. 6a. Petitioners also obstructed justice by making payments totaling $25,000 to James Wining, a former business associate, in an effort to bribe him to "keep his mouth shut" about petitioners' various fraudulent and otherwise unlawful activities. *Id.* at 8a-9a.

2. At trial, the government's evidence included the testimony of Michael Trigueiro and John Hyde. Trigueiro, a former CAIC executive, testified that

petitioners exceeded the scope of their authority as agents of CAIC when they committed CAIC to providing health insurance for WBA members. Hyde, a former executive of a company that administered health benefits plans, testified about agreements between that company and petitioners. Defense counsel cross-examined both Trigueiro (Tr. 46-95) and Hyde (Tr. 209-324) at great length, but the district court sustained the government's objections to questions concerning civil lawsuits brought against Trigueiro and Hyde by members of the WBA. Tr. 94-95, 300-301.

At sentencing, the district court imposed an eleven-level increase in petitioners' offense levels under the Sentencing Guidelines, based on its finding that petitioners had caused losses in excess of $800,000. See Pet. App. 14a. That amount included the $649,090 that petitioners transferred out of the TransPacific account and had used for purposes other than paying WBA members' health insurance claims. *Ibid.* It did not reduce the amount of loss by the amount of insurance claim payments petitioners allegedly made to WBA members after closing the TransPacific account.

3. The court of appeals affirmed. As to the district court's limitation of petitioners' cross-examination of the government witnesses, the court noted that "[a]lthough the Sixth Amendment's Confrontation Clause guarantees defendants an opportunity for effective cross-examination, the district court retains wide latitude to impose reasonable limits." Pet. App. 10a (citing, *inter alia*, *Delaware* v. *Van Arsdall*, 475 U.S. 673 (1986)). The court found no Confrontation Clause violation, concluding that the district court "did not abuse its discretion in limiting the extent of cross-examination regarding CAIC civil litigation over WBA premiums

* * *—these issues were adequately explored throughout the trial." *Id.* at 10a-11a.

The court of appeals also rejected a variety of sentencing claims raised by petitioners. See Pet. App. 14a-17a. The court held that petitioners' contention that they paid $674,102 to, or on behalf of, WBA members after they closed the TransPacific account did not render the district court's loss determination clearly erroneous. See *id.* at 14a. The court explained that for sentencing purposes, the amount of loss "is the greater of the loss defendants intended to inflict at the time of the fraud, or the actual loss, so later repayments do not necessarily affect the loss determination." *Ibid.*

ARGUMENT

Petitioners contend that the court of appeals' rejection of their Confrontation Clause argument was premised on a finding of harmless error. They assert that by making such a finding even though the government did not argue harmless error, the court exacerbated a conflict among the courts of appeals over whether, and under what circumstances, a court may engage in a "*sua sponte* harmless error analysis." Pet. 11-12. Petitioners further argue that the court of appeals erred in holding that the district court need not have considered alleged repayments made by petitioners to their fraud victims when calculating how much loss petitioners caused under Section 2F1.1 of the Sentencing Guidelines. Petitioners' contentions are without merit, and do not warrant this Court's review.

1. a. Contrary to petitioners' assertions (Pet. 14), the court of appeals did not premise its rejection of their Confrontation Clause argument on a finding of harmless error. Rather, the court held that the district court did not abuse its discretion in limiting petitioners'

cross-examination of Trigueiro and Hyde. Pet. App. 10a-11a.

A criminal defendant's Sixth Amendment right to confront witnesses against him by cross-examination is not unlimited. Rather, the scope of cross-examination is subject to control by the trial judge, who may impose limits on defense counsel's inquiry into the potential bias of a prosecution witness. *Delaware* v. *Van Arsdall*, 475 U.S. 673, 679 (1986). As this Court explained in *Van Arsdall*, "trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Ibid*; see *Delaware* v. *Fensterer*, 474 U.S. 15, 20 (1985) ("[T]he Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.").

Applying that rule, the court of appeals in this case held that "the [district] court did not abuse its discretion in limiting the extent of cross-examination" of Trigueiro and Hyde, because the issues on which petitioners sought cross-examination "were adequately explored throughout the trial." Pet. App. 10a-11a. Specifically, the court of appeals concluded that the district court was within its discretion in sustaining the government's objection to cross-examination regarding insurance-related lawsuits brought by WBA members against Trigueiro and Hyde.[1] *Id*. at 10a. Thus, contrary

[1] Petitioners do not purport to challenge the merits of the court of appeals' determination that the district court was within its

to petitioners' description (Pet. 14), the court of appeals did not find that the district court erred in restricting cross-examination. Having found no error, the court had no occasion to engage in a harmless error analysis.

Petitioners assert that the court of appeals' reference to the exploration of the pertinent financial issues "throughout the trial," Pet. App. 11a, was necessarily a harmless error finding because the Confrontation Clause inquiry focuses on individual witnesses rather than on "the outcome of the entire trial." Pet. 14 (quoting *Van Arsdall*, 475 U.S. at 680). Petitioners misconstrue the court of appeals' holding on this point. The court did not assess the balance of evidence presented throughout the trial. Rather, it considered whether the specific issues petitioners sought to draw out on cross-examination had already been adequately explored and developed before the jury. See Pet. App. 10a-11a. The court of appeals' analysis therefore focused on evidence relevant to the testimony of specific witnesses, rather than on the strength of the government's case overall. In light of the issues that had already been developed in the course of those witnesses'

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discretion in limiting petitioners' cross-examination on this point. See Pet. i (not listing that issue among the questions presented). To the extent petitioners do mean to challenge the merits of that determination, the factbound nature of the issue renders it inappropriate for this Court's review.

We note, however, that there was evidence before the jury that petitioners' actions had adverse financial consequences for CAIC and Trigueiro. See Tr. 45, 165-167. Thus, the jury heard evidence regarding Trigueiro's purported motive to testify against petitioners, and petitioners are incorrect that "the district court precluded *all* questioning regarding the witnesses' financial motive to lie." Pet. 14. It was within the district court's discretion to limit further exposition of that point.

testimony, the court held that the district court was within its discretion in limiting the cross-examination of those witnesses.

b. Even if the court of appeals' decision could be construed as premised on a finding of harmless error, the decision is not at odds with any decision of this Court or any other court of appeals. All the courts of appeals that have addressed the issue have concluded that appellate courts may, in their discretion, consider whether an error was harmless even where the government has failed to make a harmless error argument in its brief. See, *e.g.*, *United States* v. *Torrez-Ortega*, 184 F.3d 1128, 1136 (10th Cir. 1999); *United States* v. *McLaughlin*, 126 F.3d 130, 135 (3d Cir. 1997), cert. denied, 118 S. Ct. 2366 (1998); *United States* v. *Rose*, 104 F.3d 1408, 1414 (1st Cir.), cert. denied, 520 U.S. 1258 (1997); *United States* v. *Montgomery*, 100 F.3d 1404, 1407 (8th Cir. 1996); *Horsley* v. *Alabama*, 45 F.3d 1486, 1492 n.10 (11th Cir.), cert. denied, 516 U.S. 960 (1995); *Lufkins* v. *Leapley*, 965 F.2d 1477, 1481 (8th Cir.), cert. denied, 506 U.S. 895 (1992); *United States* v. *Pryce*, 938 F.2d 1343, 1348 (D.C. Cir. 1991), cert. denied, 503 U.S. 941 (1992); *United States* v. *Giovannetti*, 928 F.2d 225 (7th Cir. 1991); see also *United States* v. *Peay*, 972 F.2d 71, 76 n.* (4th Cir. 1992) (Luttig, J., concurring in part and dissenting in part).

In *Giovannetti*, the Seventh Circuit identified three factors for an appellate court to consider when deciding whether to undertake a harmless error analysis in the absence of a harmlessness argument from the government: (1) the length and complexity of the record; (2) the certainty of the harmlessness finding; and (3) whether a reversal will result in protracted, costly, and futile proceedings in the district court. 928 F.2d at 227. Other courts of appeals, including the court below in this case, have cited *Giovannetti* with general approval, although they have not necessarily viewed the *Giovannetti* factors as comprising an exhaustive list. See, *e.g.*, *Torrez-Ortega*, 184 F.3d at 1136 n.7 ("We do not decide whether the *Giovannetti* factors are exhaustive."); *Rose*, 104 F.3d at 1414 (finding the reasoning of *Giovannetti* "helpful," but not restricting its analysis to the *Giovannetti* factors); *Lufkins*, 965 F.2d at 1481 (noting the *Giovannetti* factors and adding that "when an appellate court conducts a review of the record on its own initiative, it should err on the side of the criminal defendant").[2]

To the extent different courts of appeals describe their discretion in this area in slightly different terms, petitioners make no showing that such variations have produced disparate results. Rather, petitioners rely on a dissenting opinion for the proposition that *sua sponte* harmless error review is always barred. Pet. 13, 15 (citing *Pryce*, 938 F.3d at 1352-1355 (Silberman, J., dissenting). That view was rejected by the majority in that case, and it has not been endorsed by any other court of appeals.

2. Petitioners also challenge (Pet. 15-18) the district court's calculation, for sentencing purposes, of the loss attributable to their fraud. Under Section 2F1.1 of the Sentencing Guidelines, the offense level for crimes

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[2] Petitioners recognize that the Eighth Circuit has previously "followed the *Giovannetti* test," Pet. 12, n.6, but they fault the court of appeals in this case for not expressly discussing why the *Giovannetti* factors support engaging in *sua sponte* harmless error review here. Pet. 14-15. Petitioners cite no authority for the proposition that such express discussion is required. More fundamentally, there was no occasion for the court of appeals to engage in such discussion here, because, as explained above, the court expressly held that the district court committed no error at all.

involving fraud or deceit depends in part on the loss caused by the offender. See Sentencing Guidelines § 2F1.1(b)(1). The application notes to Section 2F1.1 explain that "loss is the value of the money, property, or services unlawfully taken." *Id.* § 2F1.1 comment. (n.7) (1995).[3] Further, "if an intended loss that the defendant was attempting to inflict can be determined, this figure will be used if it is greater than the actual loss." *Ibid.*

In this case, the district court assessed an eleven-level increase in petitioners' offense levels, based on its finding that petitioners caused losses in excess of $800,000. Petitioners contend (Pet. 15-18) that the district court was required to offset that amount by $674,102, the amount that petitioners claim they paid to, or on behalf of, WBA members after they closed the TransPacific account and transferred its deposits to other accounts. As the court of appeals held, however, later repayments "do not necessarily affect the loss determination." Pet. App. 14a. Rather, loss is generally defined as "the value of the money, property, or services unlawfully taken." Sentencing Guidelines § 2F1.1 comment. (n.7) (1995); see *United States* v. *Mucciante*, 21 F.3d 1228, 1238 (2d Cir.) ("Under the Guidelines, 'loss' includes the value of all property taken, even though all or part of it was returned.") (quoting *United States* v. *Brach*, 942 F.2d 141, 143 (2d Cir. 1991)), cert. denied, 513 U.S. 949 (1994). Both the district court and the court of appeals concluded that the funds in the TransPacific account were "initially taken by fraud" from the moment they were deposited in that account. Pet. App. 4a-5a. Moreover, even after

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[3] The same commentary now appears in note 8 to the current version of the Sentencing Guidelines.

whatever repayments petitioners may have made, there were still substantial unpaid insurance claims resulting from petitioners' fraudulent endeavor. *Id.* at 17a (noting the existence of $1,000,000 in unpaid claims).

Contrary to petitioners' assertion (Pet. 17), the decision below does not conflict with decisions of other courts of appeals in which the attributable loss under Section 2F1.1 was reduced by repayments made before discovery of the fraud. See *United States* v. *Stoddard*, 150 F.3d 1140 (9th Cir. 1998), cert. denied 119 S. Ct. 1089 (1999); *United States* v. *Holiusa*, 13 F.3d 1043 (7th Cir. 1994); *United States* v. *Buckner*, 9 F.3d 452 (6th Cir. 1993). The facts here differ significantly from the facts of those cases, as the great majority of the insurance payments for which petitioners seek credit were made *after* their fraud was discovered. Compare Tr. 36-45 (on or about October 2, 1991, officials at CAIC became aware that petitioners were marketing unauthorized health insurance under CAIC's name, and challenged that action) with Def. Exh. 120 (showing that petitioners made health insurance payments after October 2, 1991). As petitioners conede (Pet. 16-17), repayments made after the discovery of the fraud should not be used to offset the loss calculation for sentencing purposes. See, *e.g.*, *Stoddard*, 150 F.3d at 1146 ("Repayments do not apply to actual loss if they are made after discovery of the offense but prior to indictment.").

Moreover, even if petitioners had made the insurance payments before the discovery of their misconduct, the court of appeals' decision in this case would present no intercircuit conflict. *Buckner* involved fraudulent loan applications based on misrepresentation of assets, and thus implicated the specific language of Application

Note 7 to the 1991 version of the Sentencing Guidelines. See 9 F.3d at 453-454. That Note defined "loss" in that specific category of cases as "the amount of the loan not repaid at the time the offense is discovered." *Id.* at 454. Based on that language, *Buckner* held that the sentencing court should have considered only the loan repayments that had been made prior to discovery of the fraudulent scheme. *Buckner* has no application here, as the Guidelines do not similarly define the type of loss caused by petitioners.

In *Stoddard*, the Ninth Circuit endorsed an "economic reality" approach to the determination of actual loss, and advised sentencing courts to "determine what losses the defendant truly caused." 150 F.3d at 1146. The court noted that its approach would reduce the amount of attributable loss in fraud cases by amounts repaid before discovery of the offense. That discussion was mere dictum, however, because the court in *Stoddard* found that the defendant's repayments in that case had all been made after the discovery of his fraud. *Ibid.* In any event, *Stoddard* does not speak to cases such as this one, where the sentencing court found an upward departure warranted because of "an enormous amount of harm and loss attributable to the defendants on actions that cannot be accurately calculated and fit into the guideline criteria." Tr. 3636 (describing extensive collateral harm caused by petitioners' conduct); see Pet. App. 16a-17a. It is anything but clear that petitioners would be assisted by an "economic reality" approach such as that endorsed in *Stoddard*.

Finally, *Holiusa* involved a "Ponzi" scheme where the fraudulent plan itself necessarily included the return of some funds to some investors. The *Holiusa* court found that in such circumstances it was inappropriate to include the gross amount of all the victims' investments when calculating the total loss for purposes of Section 2F1.1. See 13 F.3d at 1046-1048. *Holiusa* held that where the return of some funds is "an integral aspect of [a] scheme," funds that are returned should not be included as intended loss. *Id.* at 1047. This case does not involve such a scheme. See *United States* v. *Bald*, 132 F.3d 1414, 1417 n.6 (11th Cir. 1998) (distinguishing *Holiusa* and other cases involving "crimes [that] * * * contemplate, by their nature, the payment of some money to the victim" from cases such as this one).

In any event, even if the circuits were divided on this issue, the conflict would be limited to the interpretation and application of Section 2F1.1(b)(1) of the Sentencing Guidelines. As this Court explained in *Braxton* v. *United States*, 500 U.S. 344 (1991), conflicts among the courts of appeals regarding interpretation of the Sentencing Guidelines generally do not warrant plenary review by this Court. Rather, resolution of such conflicts is best reserved for the Sentencing Commission, which has been charged by Congress with reviewing judicial applications of the Guidelines and is empowered by Congress to "make whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest." *Id.* at 348.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
JAMES K. ROBINSON
Assistant Attorney General
WILLIAM C. BROWN
Attorney

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